UNITED STATES OF AMERICA v. DAVID M. HICKS	)	**DEFENSE REPLY TO GOVERNMENT RESPONSE TO MOTION TO DISMISS FOR DENIAL OF FUNDAMENTAL RIGHTS** **26 October 2004**

The Defense in the case of the *United States v. David M. Hicks* moves to dismiss the charges against Mr. Hicks, and in reply to the government's response to the defense motion states as follows:

1. **Synopsis**: Mr. Hicks has been denied fundamental rights in criminal procedure. All charges against him should be dismissed.

2. **Facts**: The question raised is a question of law.

3. **Discussion**:

In essence, the government's argument in its response is that the President's Military Order and the government-issued Military Commission Orders (MCO) and Instructions (MCI) are sufficient to ensure Mr. Hicks receives a full and fair hearing. The government then lists the provisions of the MCOs and MCIs it believes will effect a full and fair hearing.

The government misses the point. Regardless whether or not the MCO's and MCI's provide some protections for Mr. Hicks (and to what extent), the military commission process the government has created, and continues to develop even though the prosecution is well underway, to try Mr. Hicks is fundamentally flawed because, from top to bottom, it is stacked against Mr. Hicks. Indeed, it is respectfully submitted that not a single member of the U.S. military, including the members of the commission, would, if a defendant in such a system, consider it full, fair or impartial, and willingly submit to such a system for adjudication of *any* case, much less one that might subject him or her to life imprisonment.

Also, the defects in the rules, procedures, and proceedings that have been enumerated in this motion operate not only independently to establish that they cannot afford Mr. Hicks the requisite full and fair trial, but also in combination to compel the same conclusion. Indeed, the cumulative effect of the serious flaws in the commission system are far graver than the impact of any single deficiency noted below and/or in the initial motion papers.

Statements by Senior U.S. Government Officials

The President, the Attorney General, and the Secretary of Defense (the official who is charged with providing a full and fair trial for Mr. Hicks) have all made public and widely disseminated statements to the effect that Mr. Hicks and the other Guantanamo detainees are killers, and terrorists, and all of the other statements listed in the defense motion. That prejudgment, particularly from officials with authority over members of the commission, preclude a fair trial for Mr. Hicks.

The commander in chief told the entire world that the people being held at Guantanamo are terrorists and killers. The government then, dutifully, charged one of them, Mr. Hicks, with both "terrorism" and attempted murder. All of the commission members are military officers. Such statement by the commander in chief would influence any military officer to believe Mr. Hicks was guilty of that offense, and would certainly completely undermine confidence in a guilty verdict.

In response, the prosecution attempts to minimize the importance and influence of these statements by labeling them as political rhetoric.[1] That attempted distinction is simple sophistry, for regardless of how they are labeled, such statements constitute *per se* unlawful command influence (UCI). Such blatant UCI strikes at the very heart of fairness in any military tribunal. Such statements from a military commander convening a court-martial would not be tolerated, and here the prejudice is even more acute considering the general unpopularity of the detainees due to their alleged affiliation with the Taliban and al Qaeda, and the source of the statements – the Commander-in-Chief and his principal subordinate(s). In that light, the commission members cannot help but have been influenced by such statements, and that such influence is fatal to Mr. Hicks receiving a full and fair trial.

The Lack of Even Rudimentary Rules of Evidence

While the MCOs and MCIs purport to set out some procedural protections for the accused (some of which, like the presumption of innocence, have already been irreparably impaired by UCI), the rules for the admission of evidence (and lack thereof) in commission proceedings are totally irreconcilable with a full and fair trial. The prosecution has announced its intention to use in its direct case the rankest hearsay, including coerced statements by Mr. Hicks and other detainees. Use of such statements will deprive Mr. Hicks of his rights to confront the evidence and cross-examine – fundamental rights firmly rooted in the traditions of Western jurisprudence, *see Crawford v. Washington*, ___ U.S. ___, 124 S. Ct. 1354 (2004) – and expose the commission to information that was not

[1] The government apparently puts great stock in some political rhetoric. In several of its responses to defense motions, it has cited to the President's statement that "we are at war," and we are in a "Global War with al Qaeda," or we are involved in a "Global War on Terrorism" for the proposition that we are involved in an international armed conflict with al Qaeda, a non-state entity. These terms are rhetorical, or political phrases that have no legal effect on the applicability of the Law of Armed Conflict. The government's use of them to support its legal arguments is disingenuous at best.

illegitimately obtained, but which is of dubious, if any, reliability. Such a system cannot be fair.

Unprecedented Charges that are Impermissibly Vague and Not Cognizable Under the Pre-Existing Law of War or International Law

The government has invented for this commission the offenses it alleges Mr. Hicks committed. He is not charged with any violations of the law of war as it existed at the time he committed the conduct.[2] The charges are all from a group of offenses created by MCI No. 2 and denominated "offenses triable by military commission." These "offenses," with the exception of the charge of "aiding the enemy" were created by the government, and first published in MCI No. 2. They are without precedent or legal authority beyond the self-fulfilling MCI No. 2.

Further, the charges themselves are vague. For example, Mr. Hicks is charged with "attempted murder." But the government does not allege one specific fact that would identify the place or manner of such an attempt, or at whom it was directed. Such vague charges make it impossible for Mr. Hicks to prepare a defense, and are fatal to Mr. Hicks' chance to receive a full and fair trial.

Conclusion

Under this commission system, the commission acts as finder of both law and fact. The commission has the power and responsibility to ensure the system the government has created to try Mr. Hicks will give him a full and fair trial. Mr. Hicks is facing a trial in which he could be sentenced to prison for the rest of his life. Given the above, and other significant faults with the government's system, it is clear that the commission system denies Mr. Hicks his fundamental rights – rights that are essential to the full and fair trial to which he is entitled under all U.S. and international norms, and under the express terms of the Presidential Order constituting the commission. As a result, the charges against Mr. Hicks must be dismissed.

4. Evidence:

    1. The testimony of expert witnesses.
    2. Attachments: *Crawford v. Washington*, __ U.S. __, 124 S. Ct. 1354 (2004)

5. Relief Requested: The defense requests that all charges be dismissed.

6. The defense requests oral argument on this motion.

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[2] While it would not matter whether the law of war has since been changed to incorporate such offenses, as such application to Mr. Hicks would constitute an *ex post facto* law, in fact the law of war has not been expanded to include the charged offenses. Thus, each of the charged offenses is entirely a creature of MCI No. 2, without any other foundation or precedent in military or international law.

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